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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU LLC, (now known as CONNECTU INC.), ET AL.

Defendants.

CASE NO. C 07-01389 RS

NOTICE OF MOTION AND MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANT WINSTON WILLIAMS

Date: January 23, 2008
Time: 9:30 a.m.
Courtroom: 4
Mag. Judge: Hon. Richard Seeborg

Filed concurrently with a Civil L.R. 6-3 Application for Order Shortening Time

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 23, 2008 at 9:30 a.m. or soon thereafter as counsel may be heard by Magistrate Judge Richard Seeborg of above entitled Court, located at 280 South First Street, San Jose, California, the law firm of Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P. will and hereby does move this Court for an Order allowing it to withdraw as counsel for Defendant Winston Williams.

Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.'s assertions are based upon this Motion, including the accompanying Memorandum and Points and Authorities in Support of Motion to Dismiss, and the accompanying Declarations of Scott R. Mosko and Jason Webster, all the pleadings in the case, and such other arguments and evidence as may properly come before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan Henderson" or "The Firm") has lost contact with its client, Winston Williams, one of the defendants in this case. Despite multiple efforts to communicate with Mr. Williams over a five week period, Finnegan Henderson has been unable to reach him. Absent Mr. Williams' assistance, Finnegan Henderson is unable to adequately defend him in this action.

Although it is not uncommon for a client to become temporarily unavailable, recent circumstances in this case have occurred that require the Firm to withdraw. Last week this Court issued an Order compelling Mr. Williams to provide further responses to discovery. Nearly a month prior to the issuance of this Order, The Firm attempted to communicate with Mr. Williams, in light of Plaintiffs' Reply in the Motion that resulted in the Order. Three days after this Order issued, The Firm notified Plaintiffs of its inability to continue representing Mr. Williams because he has failed to communicate with it. Six days after this Order issued, Finnegan Henderson brings this motion to be relieved from representing Mr. Williams.

II. FACTS

Finnegan, Henderson brings this motion because it cannot continue representing Mr. Williams because he is not communicating. The last contact The Firm had with Mr. Williams was during the first week of November.

This last contact occurred during the course of a Motion to Compel, filed by Plaintiffs. That Motion alleged that based on Mr. Williams' earlier deposition testimony, he should be compelled to provided further responses to two interrogatories. During the meet and confer before this Motion was filed, and in the Moving Papers, Plaintiffs asserted that specific evidence attached as exhibits to their moving papers and several lines of testimony suggested Mr. Williams had further information related to these interrogatories. *See* Williams Decl. at ¶ 3 (Docket No. 221, Ex. 3). Based upon these allegations, Mr. Williams participated in an investigation of this evidence and testimony. He assisted in analyzing files that were referenced in this testimony, and he again reviewed certain evidence that he had in his possession. *See* Williams Decl. at ¶ 4 (Docket No. 221, Ex. 3). Mr. Williams satisfied himself that upon re-review of the testimony, the files found on the servers referenced in this testimony, and whatever other files and documents he had in his possession, he was unable to provide further responses to the interrogatories at issue. On November 7, 2007, Mr. Williams signed a declaration in support of his Opposition to Plaintiffs' Motion to Compel, which in part stated, "I have reviewed my responses to Interrogatory Nos. 3 and 4. The files [found on the three PNS servers discussed at deposition] are not helpful in responding to these interrogatories. I am not aware of any other information created at PNS or otherwise, that would provide further information than what was provided in my responses to Interrogatory Nos. 3 & 4." *See* Williams Decl. at ¶¶ 5, 6 (Docket No. 221, Ex. 3).

On November 14, 2007, Plaintiffs surprised Mr. Williams and his counsel by filing a reply in the Motion to Compel that referred to at least three (3) new documents *that were never mentioned in either the meet and confers or the Moving Papers*, as the bases upon which an Order compelling further responses should issue. *See* Cooper Decl. in Support of Plaintiffs' Reply Memorandum in Support of Facebook's Motion to Compel at Ex. J, K, L (Docket No. 223). Plaintiffs later filed a supplemental declaration in support of Facebook's reply memorandum, raising yet additional documents to support their Motion to Compel. *See* Greer Decl. in Support of Facebook's Reply Memorandum in Support of Facebook's Motion to Compel at Ex. M (Docket No. 229). Had these new documents been raised in the meet and confer or even in the Moving Papers, Mr. Williams would have been provided with them during the course of the initial investigation to determine whether he could provide any further information. Instead, Plaintiffs waited until the Reply to discuss these documents.

Immediately after Plaintiffs' Reply was filed, Finnegan Henderson commenced efforts to communicate with Mr. Williams. The Firm telephoned Mr. Williams at least every other day to telephone numbers previously used for communication. Both numbers were operational. Each time calls were made to these numbers, a recording device was activated, inviting the caller to leave a message. Each time the Firm was forwarded to these recording devices, messages were left. (Webster Decl. ¶ 3) Additionally, The Firm sent several emails to Mr. Williams' email address. None of the emails bounced. (Webster Decl. ¶ 5) In their emails, The Firm provided excerpts of Facebook's Reply brief, and further culled out for Mr. Williams the new documents Plaintiffs relied up in their Reply papers to assist him in determining whether these additional documents sparked further recollections as they might concern interrogatories at issue. (*Id.*) Despite these efforts to communicate with Mr. Williams, he has not responded.

On December 12, 2007, the Court issued its Order granting Plaintiffs' Motion to Compel Pacific Northwest Software and Winston Williams to Provide Complete and Supplemental Responses to Facebook's First Set of Interrogatories Nos. 3 & 4. Further, the Court ordered that the supplemental responses be submitted within twenty (20) days of the date of the Order. Finnegan Henderson's efforts to communicate with Mr. Williams continued after this Order issued. Several calls were made on December 12, 13, and 14. (Webster Decl. at ¶ 4.) (Mosko Decl ¶ 2) On December 14, 2007, The Firm notified Plaintiffs of its inability to communicate with Mr. Williams, seeking an extension of time in which to further investigate his whereabouts, or in the alternative an agreement for an Order shortening time for this Motion to Withdraw. *See* Mosko Decl., Ex. 1.

Surprisingly, Plaintiffs refused both requests, necessitating this motion, and the accompanying application for Order shortening time, in light of the recent Order compelling further responses, and additional pending discovery. *See* Mosko Decl., Ex. 2.

Specific efforts to communicate with Mr. Williams after he signed the Declaration in Support of the Opposition to the Motion to Compel are set forth below:

a. The Firm began its recent efforts to reach Mr. Williams the day it received Plaintiffs' reply brief in support of their Motion to Compel. On November 14, 2007, the day the reply brief was filed, The Firm, through its associate Jason Webster, placed a call to Mr. Williams. In addition, Mr. Webster forwarded a summary of the new information presented by Plaintiffs to Mr. Williams last known email address. Neither of these communications were answered. *See* Webster Decl. at ¶¶ 3, 5.

b. At least every other day since November 14, 2007, Mr. Webster attempted to call Mr. Williams at the two telephone numbers The Firm had previously used to communicate with Mr. Williams. *See* Webster Decl. at ¶ 3.

c. On at least three separate occasions, lead counsel for Mr. Williams, Scott Mosko left voicemails for Mr. Williams, using the phone numbers previously provided by Mr. Williams. *See* Mosko Decl. at ¶ 4.

d. Further emails seeking to re-establish communication with The Firm were sent to Mr. Williams, specifically to the email address through which The Firm had previously successfully communicated with Mr. Williams. *See* Webster Decl. at ¶ 5.

As a result of this loss of contact and in light of the approaching deadline to provide supplemental responses to Facebook's First Set of Interrogatories Nos. 3 & 4, Finnegan Henderson is forced to file the instant Motion to Withdraw as Counsel for Winston Williams. Last week The Firm sent Mr. Williams a letter to his last known address advising that unless Mr. Williams re-established communication with The Firm, it would request an Order to withdraw as his counsel. This letter was sent via Federal Express and as of Friday December 14, 2007, Federal Express advised that one of the letters was returned as the addressee is unknown. The other letter was sent to a post office box where it could sit for weeks or months before it is returned. (Webster Decl. ¶ 7) Finnegan Henderson can no longer adequately represent Mr. Williams in the instant litigation and in light of the pending Order requiring Mr. Williams to supplement his responses to Plaintiffs' First Set of Interrogatories Nos. 3 & 4 by January 2, 2008, Finnegan Henderson is requesting to Withdraw as Counsel for Mr. Williams.

II. ARGUMENT

An attorney may not withdraw as counsel without leave of the Court. Civ. L.R. 11-5(a); *Darby v. City of Torrance*, 810 F.Supp. 275, 276 (C.D. Cal. 1992). The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court. *LeGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998). The factors that the Court considers when ruling on a Motion to Withdraw as Counsel are: (a) the reasons why withdrawal is sought; (b) the prejudice withdrawal may cause to other litigants; (c) the harm withdrawal might cause to the administration of justice; and (d) the degree to which withdrawal will delay the resolution of the case. *Irwin v. Mascott*, 2004 U.S. Dist. LEXIS 28264 at *4 (N.D. Cal. December 1, 2004). *See also Liang v. Cal-Bay International, Inc.*, 2007 WL 3144099 at *1 (October 24, 2007) (citing *Irwin*, 2004 U.S. Dist. LEXIS 28264 at *4). Additionally, an attorney may request permission to withdraw in matters where the client's conduct renders it unreasonably difficult for the attorney to represent the client effectively. Cal. Rules of Professional Conduct Rule 3-700 (C)(1)(d).

A. The Firm's Request to Withdraw as Counsel for Williams is appropriate

The complete lack of communication between client and counsel has been recognized as a valid reason for granting a motion to withdraw as counsel. *See Liang*, 2007 WL 3144099 at *1; *Hill Design Group v. Wang*, 2006 WL 3591206 at *4 (N.D. Cal. Dec. 11, 2006); *Nintendo of America, Inc. v. NTDEC*, 1995 WL 135996 at *4 (9th Cir. 1995) (unpublished opinion) (recognizing District Court's decision to allow withdrawal of counsel based on lack of contact with client). As discussed above, Finnegan Henderson has made repeated efforts to establish contact with Mr. Williams, however, Mr. Williams has failed to respond or communicate with The Firm. Withdrawal is appropriate under such circumstances, as not only would it be "unreasonably difficult" for The Firm to continue representing Mr. Williams given its inability to communicate with him, representation would be impossible. *See* Cal. Rules of Professional Conduct Rule 3-700 (C)(1)(d) (stating that withdrawal is appropriate if the client "renders it unreasonably difficult for the member to carry out the employment effectively").

B. Counsel's Withdrawal from Representing Williams will not Result in Prejudice to the Remaining Parties

Through previous discovery efforts, Plaintiffs have already received all the relevant documents that Mr. Williams had in his possession. Further on June 19, 2007, Plaintiffs took Mr. Williams' deposition for over four hours, supposedly eliciting whatever testimony they believed was needed for their case. The last communication counsel had with Mr. Williams, as shown in his declaration of November 7, 2007, established that Mr. Williams had no further information at least as it concerned the interrogatories at issue in the previous motion to compel. And, it is likely that Mr. Williams has no further information concerning the facts of this case than what was elicited during his July deposition. Plaintiffs will not be prejudiced as a result of Finnegan Henderson's withdrawal from representing Mr. Williams.

C. Counsel's Withdrawal from Representing Williams will not Interfere with This Court's Administration of Justice

This case has little to do with Mr. Williams. This case was filed initially by TheFacebook as a retaliatory action to ConnectU's earlier-filed action in Massachusetts in which ConnectU accuses co-plaintiff Mark Zuckerberg and others of stealing the idea and other things that resulted in the creation of facebook.com. Indeed, once this Massachusetts action is resolved, this case will undoubtedly end as well. Moreover, Plaintiffs know full well they could never recover any "damages" from Mr. Williams. Indeed there were no actionable wrongs committed by any of the defendants. But even if there were, as the previous declaration filed by Mr. Williams in support of his Motion to Dismiss disclosed, he has no funds from which any damages could be collected. *See* Winston Williams Supplemental Decl. in Support of Motion to Dismiss at ¶¶ 4, 5 (Docket No. 105).

He is a journeyman programmer moving from small job to small job in order to sustain himself. Mr. Williams is caught in between the ConnectU/Facebook dispute. His lack of counsel will not interfere with this Court's administration of justice.

D. Counsel's Withdrawal from Representing Williams will not Delay this Case

As stated above, Plaintiffs have already taken Mr. Williams deposition. During that deposition, Plaintiffs undoubtedly asked everything that they believed was necessary for this case. It is highly unlikely that Mr. Williams could add more to what he has already said. And, as stated above, once the Massachusetts case is resolved, so too will this case. Mr. Williams' lack of counsel will not delay this case.

III. CONCLUSION

The four factors set forth in *Irwin* justify this Court's Order allowing Finnegan Henderson to withdraw from representing Mr. Williams in this case. This Court's recent Order compelling further answers to discovery by January 2, 2008, and pending discovery to which Plaintiffs will not grant requested extensions require The Firm to withdraw from representing Mr. Williams. The Firm's Motion pursuant to Civil L.R. 11-5(a) and Cal. Rules of Professional Conduct Rule 3-700 (C)(1)(d) should now be granted.

Respectfully submitted,

Dated: December 18, 2007

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

By: /s/
Scott R. Mosko
Attorneys for Defendant
Winston Williams